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In the Supreme Court of the United States

OCTOBER TERM, 1976

SANTA CLARA PUEBLO, ET AL., PETITIONERS

v.

JULIA MARTINEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of January 25, 1977, inviting the Solicitor General to express the views of the United States.

QUESTIONS PRESENTED

1. Whether the federal courts have jurisdiction under 28 U.S.C. 1343(4) over suits alleging violations of the Indian Civil Rights Act (25 U.S.C. 1301-1303).

2. Whether Congress, in enacting the Indian Civil Rights Act, waived the immunity from suit of Indian tribes.

3. Whether an ordinance of the Santa Clara Pueblo that denies membership in the Tribe to children of women who marry outside the Tribe but not to children of men

who marry outside the Tribe violates the equal protection clause of the Indian Civil Rights Act (25 U.S.C. 1302(8)).

STATEMENT

Respondents, a female member of the Santa Clara Pueblo Indian Tribe and her non-member daughter, brought this class action for declaratory and injunctive relief in the United States District Court for the District of New Mexico. The complaint named as defendants the Santa Clara Pueblo and the Governor of the Pueblo individually and in his official capacity (Pet. App. 1a). Respondents alleged in the complaint that a Pueblo ordinance that denies membership to the children of women, but not men, who marry outside the Pueblo discriminated against them on account of sex.

In a separate opinion on jurisdiction, the district court held that the Indian Civil Rights Act and 28 U.S.C. 1343(4) conferred jurisdiction over this cause of action and that the claim against the Pueblo was not barred by sovereign immunity (Pet. App. 3a-11a). Turning to the merits, the court then held that the ordinance did not violate 25 U.S.C. 1302(8), which prohibits an Indian tribe from denying any person equal protection of its laws or depriving any person of liberty or property without due process of law. The court reasoned that "25 U.S.C. §1302(8) should not be construed in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions" (Pet. App. 25a).

The court of appeals reversed. Agreeing with the district court that it had jurisdiction over the claim and that sovereign immunity did not bar relief, the court of appeals labelled the ordinance "plain discrimination"

and condemned it as "an arbitrary and expedient solution" to an economic problem facing the Pueblo when it passed the ordinance in 1939 (*id.* at 45a). The court stated that "subsection (8) means what it says and * * * the ordinance is out of harmony with it" (*ibid.*).

DISCUSSION

This case presents important questions regarding the interpretation and effect of the Indian Civil Rights Act. Although the federal courts of appeals have generally agreed that the Indian Civil Rights Act, coupled with the provisions of 28 U.S.C. 1343(4), confers jurisdiction on the federal courts to review tribal actions allegedly in conflict with the Act, that issue is sufficiently important to merit final resolution by this Court. Moreover, the standard by which tribal actions are to be measured against the Act's equal protection clause is a troublesome and significant issue that warrants the Court's attention. It is therefore the position of the United States that the Court should grant the petition for a writ of certiorari in this case.

1. Although Indian tribes have many attributes of sovereign nations, the Bill of Rights does not regulate their actions with regard to their members. *Talton* v. *Mayes*, 163 U.S. 376; *Native American Church* v. *Navajo Tribal Council*, 272 F. 2d 131 (C.A. 10); see also *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (C.A. 8). But see *Colliflower* v. *Garland*, 342 F. 2d 369 (C.A. 9). In response to a perceived lack of constitutional safeguards for individual Indians vis-a-vis their tribes, Congress in 1968 enacted the Indian Civil Rights Act (Pub. L. 90-284, 82 Stat. 73, 77, Title II of the Civil Rights Act of 1968; now codified as 25 U.S.C. 1301-1303). The Act enumerates certain

specific rights, with particular emphasis on criminal procedure, that tribal governments may not abridge. The controversy in this case arises under Section 1302(8) of the Act, which provides:

> No Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law [25 U.S.C. 1302(8)].

The Act contains no specific provision giving federal courts general jurisdiction over suits alleging violations of the Act.[1] The courts thus have been left the duty of interpreting the Act to make it effective, while at the same time protecting Indian self-government.[2] In this case the court of appeals ruled (Pet. App. 32a-33a), as have the other federal courts of appeals faced with the question,[3] that the federal courts have jurisdiction over causes of action arising under the Act by virtue of 28 U.S.C. 1343(4), which grants to federal district courts jurisdiction over cases commenced by any person "[t]o recover damages or to secure equitable or other

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[1]The only jurisdictional provision in the Act, 25 U.S.C. 1303, provides:

> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

[2]Both of these objectives are within the congressional intent. See Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harvard Journal on Legislation 557 (1972).

[3]See, *e.g.*, *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231, 1234 (C.A. 4); *Brown* v. *United States*, 486 F. 2d 658, 661 (C.A. 8); *Howlett* v. *The Salish and Kootenai Tribes*, 529 F. 2d 233, 236 (C.A. 9).

relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

We believe the question whether Section 1343(4) provides a proper jurisdictional base to protect the rights, in addition to those redressable by writ of *habeas corpus*, secured by the Indian Bill of Rights, cf. *Securities Investor Protection* v. *Barbour*, 421 U.S. 412; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, is a substantial jurisdictional question that should be resolved by this Court. That question not only is significant in itself but also is closely related to the question of sovereign immunity discussed in the following section.

2. The United States Constitution treats Indian tribes *in pari materiae* with States and foreign nations. Art. I, Sec. 8, cl. 3. This Court, while recognizing Congress' plenary authority over Indian tribes and trust responsibility towards them, has also recognized their residual sovereignty as governmental entities—a sovereignty predating the Constitution. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164; *Worcester* v. *Georgia*, 6 Pet. 515. An Indian tribe is therefore immune from suit unless that immunity is waived. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512. A waiver of the immunity of an Indian tribe must be in "plain and unambiguous terms." *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372, 376 (C.A. 8). Cf. *United States* v. *Testan*, 424 U.S. 392; *Edelman* v. *Jordan*, 415 U.S. 651.

Despite the absence of any stated congressional intent to alter historical practice, the court of appeals below held that the Indian Civil Rights Act implicitly abrogated the Indian tribes' traditional immunity from suit. Although this conclusion accords with the views of the other courts of appeals

that have considered the question (see, *e.g.*, *Crowe* v. *Eastern Band of Cherokee Indians, Inc.*, 506 F. 2d 1231, 1233-1234 (C.A. 4); *Means* v. *Wilson*, 522 F. 2d 833, 841 (C.A. 8); *Howlett* v. *The Salish and Kootenai Tribes*, 529 F. 2d at 233, 236 (C.A. 9)), we note that continued recognition of tribal sovereign immunity would not necessarily deprive the Act of any effect; the provisions of the Act would have full force in *habeas corpus* cases, 25 U.S.C. 1303, and presumably could be raised in defense to any actions initiated by the Tribe. Because the protection of sovereign immunity is of obvious importance to all tribal governments, and should not lightly be dispensed with on the basis of inferences of legislative intent, we believe this Court should give the matter plenary review.[4]

3. Although the issue was not addressed by either court below, we note that respondents named not only the Pueblo itself but also the Governor of the Pueblo as a defendant.[5] Should this Court determine that the Pueblo is shielded from suit under the Indian Civil Rights Act by the doctrine of sovereign immunity, the Court may also consider the related question whether the Act authorizes suits for declaratory and injunctive relief against tribal officers acting in their official capacities. Cf. *Ex Parte Young*, 209 U.S. 123.[6]

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[4]Respondents did not seek damages against the Tribe. Resolution of the question whether tribes are immune from suits under the Act for declaratory and injunctive relief, however, may have a significant bearing on the question whether they are immune from suits for damages as well.

[5]By Santa Claran law, the Governor is charged with enforcing the laws of the Pueblo. Pet. App. 2a-3a, 13a.

[6]Since respondents sought only injunctive and declaratory relief, the question whether tribal officers are liable for damages under the Act, cf. *Wood* v. *Strickland*, 420 U.S. 308; *Scheuer* v. *Rhodes*, 416 U.S. 232, is not presented here.

4. The Court should also grant review to consider the proper standard to be applied in cases arising under the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. 1302(8).

In holding that the 1939 Pueblo ordinance violated the equal protection clause of the Act, the court of appeals did not advance a clear standard for weighing respondents' interests against those of the Pueblo. On the one hand, the court stated that "[t]he Fourteenth Amendment standards do not * * * apply with full force" (Pet. App. 42a); on the other hand, the court held that "the facts do not support a decision that the Tribe's interest is compelling" (*id.* at 43a).[7] The court of appeals also suggested application of a "less restrictive alternative" test, rejecting the Tribe's "strongest argument" (the importance of education by a Santa Claran male in Pueblo traditions) because "there could have been a solution without discrimination" (Pet. App. 44a).

This uncertainty regarding the proper standard to be applied under the equal protection clause of the Indian Civil Rights Act is not confined to the Tenth Circuit. Although the federal courts of appeals have generally agreed that the necessity for preserving tribal culture and self-government justifies applying the equal protection clause of the Indian Civil Rights Act differently from that of the Fourteenth Amendment, they have not agreed on a workable test. (See, *e.g.*, *White Eagle* v. *One Feather*, 478 F. 2d 1311, 1314 (C.A. 8); *Howlett* v. *The Salish & Kootenai Tribes*, *supra*, 529 F. 2d at 238). For example, the Eighth Circuit, in *Means* v. *Wilson*, *supra*, 522 F. 2d at 842, framed the pertinent inquiry

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[7]The court also distinguished cases involving quantum-of-blood requirements for membership because "there is some semblance of basis for the classification" in those cases (Pet. App. 41a). See *Slattery* v. *Arapahoe Tribal Council*, 453 F. 2d 278 (C.A. 10).

as whether the challenged action was "founded in tribal custom or governmental purpose which would justify modification of traditional equal protection concepts," while the Ninth Circuit, in *Howlett* v. *The Salish and Kootenai Tribes, supra*, 529 F. 2d at 238, placed emphasis on whether "strict application of traditional equal protection doctrines would significantly impair a tribal practice or alter a custom firmly embedded in Indian culture." In other circumstances, however, federal courts of appeals have undertaken a less intensive examination of the basis and need for the tribal law, apparently requiring little more than that it be applied equally to persons similarly situated. See, *e.g.*, *Crowe* v. *Eastern Band of Cherokee Indians, supra.*

This case demonstrates the importance of a comprehensible and workable equal protection test under the Indian Civil Rights Act. The court of appeals correctly recognized that respondents had an important interest in tribal membership: "The children of Julia and Myles Martinez are 100 percent Indian and 50 percent Santa Claran. They speak the language of the Santa Clara Pueblo, namely, Tewa. They practice the customs of the Tribe and are accepted into the Tribe's religion; nevertheless, they are denied membership and face exclusion with attendant loss of rights of inheritance, residency and voting, together with ability to pass tribal membership to their offspring, solely because their mother rather than their father is a Santa Claran" (Pet. App. 43a). On the other hand, petitioners contend that such discrimination is defensible in the context of its traditionally patrilineal and patrilocal society (see Pet. App. 21a).[8] Moreover, the power to determine membership

[8]We note that non-Indian culture has only recently begun to accord women equal treatment under the law. It may therefore be necessary to determine whether social and legal changes in non-Indian society, which in turn may provoke a change in standards to be applied under the equal protection clause of the Fourteenth Amendment (compare *Hoyt* v. *Florida*, 368 U.S. 57, with *Craig* v. *Boren*, 429 U.S. 190), must be incorporated into Indian society through application of the equal protection clause of the Indian Civil Rights Act or, at least, whether the changed equal protection standards shall apply with full force.

has long been a vital part of Indian tribal sovereignty. "The courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership." Cohen, *Handbook of Federal Indian Law*, 133 (1941).[9]

5. In our view, therefore, the issues presented by this case are difficult ones with far-reaching implications for both tribal governments and tribal members.[10] Tribes and their members need to know with greater certainty the kinds of relief that federal courts can grant under the Indian Civil Rights Act and the kinds of tribal actions that are proscribed by the Act's equal protection clause. Should the Court grant certiorari, the United States will file an *amicus curiae* brief addressing these questions on the merits.

[9]Records of the Bureau of Indian Affairs indicate that at least thirteen other Indian tribes have membership provisions based upon the father's or mother's blood line.

[10]We addressed similar issues in our *amicus* memorandum responding to the petition for a writ of certiorari in *Tonasket* v. *Thompson*, certiorari denied, 419 U.S. 871.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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